

FEDERAL ELECTION COMMISSION
999 E Street, N.W.
Washington, D.C. 20463

FIRST GENERAL COUNSEL'S REPORT

PRE-MUR: 521

DATE RECEIVED: May 25, 2011

DATE ACTIVATED: June 20, 2011

EXPIRATION OF SOL:

2000 (earliest) (estimated) /

July 13, 2015 (latest)

MUR: 6475

DATE COMPLAINT FILED: June 14, 2011

DATE OF NOTIFICATION: June 16, 2011

LAST RESPONSE RECEIVED: July 18,
2011

DATE ACTIVATED: July 18, 2011

EXPIRATION OF SOL:

2000 (earliest) (estimated) /

July 13, 2015 (latest)

SOURCE:

Sua Sponte Submission by LoBiondo for
Congress and Douglas J. Heun, in his
official capacity as treasurer

COMPLAINANTS:

LoBiondo for Congress and Douglas J.
Heun, in his official capacity as treasurer

RESPONDENTS:

LoBiondo for Congress and
Nancy H. Watkins, in her official capacity
as treasurer¹
Andrew J. McCrosson, Jr.

**RELEVANT STATUTES
AND REGULATIONS:**

2 U.S.C. § 432(c)

2 U.S.C. § 434(b)

2 U.S.C. § 439a(b)

11 C.F.R. § 113.1(g)

¹ Ronald Gravino replaced Douglas J. Heun as treasurer on June 13, 2011. Nancy H. Watkins replaced Mr. Gravino as treasurer on July 15, 2011.

INTERNAL REPORTS CHECKED: Disclosure Reports

FEDERAL AGENCIES CHECKED:

I. INTRODUCTION

These matters arose from a *sua sponte* submission and complaint filed by LoBiondo for Congress and its treasurer ("the Committee") regarding unauthorized disbursements totaling approximately \$458,000 that Andrew McCrosson, the Committee's former treasurer, issued to himself in or about 1995 through 2010. According to information in the submission and complaint, McCrosson omitted the unauthorized disbursements from disclosure reports that he filed with the Commission on behalf of the Committee over the course of 15 years, and he attempted to disguise his theft by filing false disclosure reports with the Commission that misrepresented the Committee's cash-on-hand balances.

As described in further detail below, because the Committee has not yet completed its filing of amended reports with the Commission, the full of extent of the potential recordkeeping and reporting violations is unknown. Further, the Committee has not fully identified the internal controls it had in place that could have prevented the embezzlement. The Office of General Counsel ("OGC") intends to provide the Committee with the opportunity to supplement its *sua sponte* submission with more complete information concerning the violations and to clarify the public record, which will aid our assessment of the Committee's potential liability.² Therefore, we recommend that the Commission take no action as to the Committee at this time. We also

² Ordinarily, OGC provides *sua sponte* submitters with additional time to supplement the submission and respond to questions aimed at completing the factual record concerning the potential violations before circulating a First General Counsel's Report. However, this Report is being submitted pursuant to the Commission's Directive 68, which addresses the "Accelerated Processing of Statute of Limitations-Sensitive Enforcement Matters" and assigns 30-day deadlines for circulation of the First General Counsel's Report for statute of limitations-sensitive matters. In order to allow more time for the Committee to supplement its submission and correct its disclosure reports filed with the Commission, we have sought a tolling agreement from the Committee and the Committee signed one.

1 recommend that the Commission find reason to believe that Andrew J. McCrosson, Jr.
2 knowingly and willfully violated 2 U.S.C. §§ 432(c), 434(b) and 439a(b). We recommend that
3 the Commission authorize an investigation as to McCrosson in order to ascertain the extent of the
4 misreporting and determine the amount in violation still within the statute of limitations.

5 **II. FACTUAL AND LEGAL ANALYSIS**

6 **A. Factual Background**

7 Congressman Frank A. LoBiondo has represented New Jersey's Second Congressional
8 District since 1994. LoBiondo for Congress is his authorized campaign committee. The
9 Committee first informed OGC of campaign finance violations in November 2010, in a meeting
10 between counsel and OGC staff. At the time, the Committee had also reported the embezzlement
11 to the Department of Justice ("DOJ") and was in the preliminary stages of gathering information
12 regarding the violations.³

13 During that meeting with OGC staff, the Committee explained that it discovered the
14 embezzlement after McCrosson, a certified public accountant, was replaced as treasurer in 2010.
15 McCrosson had accepted employment in a different part of the state, which was going to affect
16 his availability to continue working for the Committee. It appears that during the transition to the
17 new treasurer, Douglas Heun, McCrosson became evasive when he was asked to turn over the
18 Committee's financial records. *See, e.g.*, E-mails to Andrew McCrosson (dated October 18, 27,
19 29, 2010, and November 5, 2010). Once Heun received some of the Committee's records from
20 McCrosson in November 2010, he discovered checks that McCrosson had written to himself
21 without the authority to do so, discrepancies in the cash-on-hand balances that had been disclosed to

1 the Commission, and that McCrosson had created documents to make it appear that the
2 Committee had a certificate of deposit with a value of about \$460,000, when in fact, no such
3 account existed. Counsel also provided OGC staff with about forty pages of documents,
4 including copies of checks, e-mails, and account records, substantiating these discoveries. At the
5 time, the Committee believed that McCrosson had embezzled approximately \$240,000, but
6 indicated that it was still trying to assemble documents to determine the extent of the
7 embezzlement.

8 Between the meeting with OGC in November 2010 and the *sua sponte* submission it filed
9 with the Commission on May 25, 2011, the Committee cooperated with DOJ to obtain missing
10 financial records. According to information provided by the Committee, DOJ obtained
11 approximately 28 boxes of records from McCrosson, to which the Committee did not have
12 access. The Committee also simultaneously sought copies of records from its banking
13 institutions in order to conduct an internal review and eventually amend relevant reports with the
14 Commission. From December 2, 2010 through March 8, 2011, the Committee filed five
15 Miscellaneous Electronic Submissions (Form 99s) with the Commission alerting the Reports
16 Analysis Division ("RAD") of the impending amendments. The Committee stated the following
17 in all of its submissions:

18 LoBiondo for Congress ("LFC") became aware of a financial issue involving a former
19 campaign worker. LFC has contacted the appropriate federal authorities and is
20 actively cooperating with their ongoing investigation.

21
22 LFC is currently conducting an internal review of its financial records to determine
23 the scope of the issue and what amendments to previous reports may need to be filed.
24

1 These submissions to RAD, which were dated December 2 and 28, 2010, and March 8, 2011,
2 also indicate that the results of the Committee's internal review may require amendments to a
3 number of disclosure reports filed with the Commission.

4 The Committee filed a *sua sponte* submission with the Commission on May 25, 2011,
5 indicating that McCrosson embezzled approximately \$450,000 in Committee funds. Shortly
6 after its submission, the Committee also filed a complaint against McCrosson with the
7 Commission. Both the submission and the complaint attach copies of the Criminal Information
8 filed with U.S. District Court for the District of New Jersey and the plea agreement between the
9 U.S. Attorney's Office and McCrosson. McCrosson pled guilty on March 4, 2011, to wire fraud
10 and conversion of campaign funds, in violation of 18 U.S.C. § 1343 and 2 U.S.C. §§ 439a(b) and
11 437g(d)(1)(A)(i), and was sentenced on September 7, 2011 to 30 months in prison, 100 hours of
12 community service, 3 years of supervised release, and he is subject to debt and occupation
13 restrictions, and was ordered to pay \$458,000 in restitution.

14 According to the submission and complaint, McCrosson served as the Committee's
15 treasurer and custodian of records from the early 1990s until August 2010. McCrosson was the
16 only person tasked with completing and filing the Committee's disclosure reports with the
17 Commission, maintained possession of the Committee's financial records, and was the sole
18 signatory on the Committee's bank accounts. Criminal Information at 2-3. The Committee did
19 not perform "periodic reviews or audits of the [Committee] records or accounting practices
20 associated with the financial activities of the campaign committee other than the filing of the
21 required reports with the FEC." *Id.* at 3. McCrosson performed his treasurer duties chiefly from
22 a home office. *Id.*

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From about 1995 through August 2010, McCrosson wrote checks to himself from the Committee's bank account, without authorization, to pay for personal expenses. The Committee provided OGC copies of both sides of some of those checks showing that McCrosson endorsed and deposited them into his bank account. *See, e.g.*, Check Numbers 1676, 1677, 2135 and 2351 (made out to McCrosson in the amounts of \$22,500, \$5,000, \$2,500 and \$2,500, respectively).

The Criminal Information specifically cites payments "of a federal income tax lien, home mortgage payments, college tuition payments for his children, and other living expenses." Criminal Information at 5. Further, McCrosson disguised the authorized disbursements by omitting them from the Committee's FEC disclosure reports and filing false reports with the Commission that included incorrect cash-on-hand balances. *Id.* at 6. According to the Criminal Information, the Committee's cash-on-hand was misreported as follows:⁴

REPORT	DATE FILED	CASH-ON-HAND (FEC REPORTS)	CASH-ON-HAND (BANK STATEMENTS)	CASH-ON- HAND DISCREPANCY
2010 July Quarterly	July 13, 2010	\$1,170,976.14	\$636,257.15	\$534,718.99
2009 Year End	Jan. 28, 2010	\$1,122,460.53	\$603,763.80	\$518,696.73
2008 Year End	Jan. 29, 2009	\$1,177,314.59	\$712,923.69	\$464,390.90
2007 Amended Year End	June 13, 2008	\$1,395,321.59	\$949,075.65	\$446,245.94
2006 Year End	Jan. 26, 2007	\$1,332,006.63	\$1,079,954.46	\$252,052.17

The Committee's *sua sponte* submission, however, does not include specific details regarding the unauthorized disbursements and corresponding reporting violations.

The Committee indicates that it "has taken immediate corrective actions," including adopting "an internal controls policy designed to prevent on the front end any similar issue from occurring in the future," hiring a compliance firm to reconstruct its financial and accounting

⁴ We are only including amounts still within the statute of limitations in the chart below.

1 records in order to prepare amended FEC reports, and attending an FEC compliance training
2 seminar. *Sua Sponte* Submission at 1-3. It also reported the embezzlement to DOJ, and reported
3 the potential violations of the Federal Election Campaign Act of 1971, as amended ("the Act") to
4 the FEC immediately upon their discovery in November 2010. However, as of the date of this
5 report, the Committee's internal compliance review has not yet been completed and it has not yet
6 completed amending its reports with the Commission. RAD explained to this Office that it
7 usually encourages committees in situations like the LoBiondo Committee's to amend their
8 reports to the extent possible, and also to use Form 99s to provide as much detail as possible for
9 the public record concerning the unauthorized transactions. In some cases, RAD may allow a
10 committee to make an adjustment to its cash-on-hand if there are circumstances making it
11 impractical to file complete amendments.

12 In response to the complaint, McCrosson's counsel indicates that based on the factual
13 record, which includes the guilty plea, "I see no reason to supplement the record." McCrosson
14 Response at 1. Additionally, in a conversation with OGC staff, McCrosson's counsel indicated
15 that his client intends to fully cooperate with the Commission in order to close the matter
16 quickly.

17 B. Legal Analysis

18 1. Committee Liability

19 Although the Committee's failure to accurately report disbursements stems from
20 McCrosson's embezzlement scheme, the Committee nevertheless filed inaccurate reports with
21 the Commission. Committees, through their treasurers, are required to disclose disbursements
22 and cash-on-hand balances accurately. *See* 2 U.S.C. § 434(b)(1), (4) and (6)(B)(v); 11 C.F.R.
23 § 104.3(a)(1) and (b). Committee treasurers are responsible for the timely and complete filing of

disclosure reports and for the accuracy of the information contained therein. *See* 11 C.F.R. § 104.14(d). Under the Act, a committee, through its treasurer, is also required to keep an accurate account of receipts and disbursements.⁵ *See* 2 U.S.C. §§ 432(c), 434(b) and 11 C.F.R. § 104.3(b).

When determining committee liability, the Commission has examined whether the embezzlement resulted from the failure to implement adequate internal control procedures over committee finances (*e.g.*, regular audits, controls procedures over receipts and disbursements, segregated duties, or periodic review of finances).⁶ In its *Statement of Policy: Safe Harbor for Misreporting Due to Embezzlement*, the Commission stated that it would not seek a monetary penalty against a committee for filing inaccurate reports due to embezzlement if the committee had certain minimal internal controls in place at the time of the embezzlement and the committee took certain steps after discovering the embezzlement. 72 Fed. Reg. 16,695 (April 5, 2007) ("*Safe Harbor Policy*"). In the policy, the Commission states that the internal controls and post-discovery steps "represent the minimum efforts a committee must take to qualify for this safe harbor," but that it will consider "the presence of some but not all," of the enumerated controls and post-discovery activities in the policy as a mitigating factor to any civil penalty it

⁵ The Act's recordkeeping obligations include keeping an account of the name and address of every person to whom a disbursement is made, together with the date, amount, and purpose of the disbursement, and also keeping a receipt, invoice, or cancelled check for disbursements in excess of \$200. 2 U.S.C. §§ 432(c)(5), (d) and 11 C.F.R. § 102.9(a) and (b)(2). Disclosure reports shall include, *inter alia*, the amount of cash-on-hand at the beginning of the reporting period, the total amount of receipts, and the total amount of disbursements, including the name and address of each person to whom an expenditure exceeding \$200 is made together with the date, amount, and purpose of the expenditure. *See* 2 U.S.C. § 434(b)(1),(2), (4)(G), (5) and (6)(A).

⁶ *See, e.g.*, MUR 5923 (American Dream PAC); MUR 5920 (Women's Campaign Fund); MUR 5872 (Jane Hague for Congress); MUR 5811 (Doggett for U.S. Congress); MUR 5812 (Ohio State Medical Association PAC); MUR 5813 (Georgia Medical PAC); MUR 5814 (Lamutr for Congress); MUR 5721 (Lockheed Martin Employee's PAC); and MUR 5610 (Haywood/Dole).

1 assesses against a committee that fails to qualify for the protection of the Safe Harbor.⁷ *Id.* and
2 at n.1. In addition to the *Safe Harbor Policy*, the Commission has also provided guidance
3 concerning internal controls "intended to assist committees in protecting their assets and
4 complying with the requirements of the FECA." *See Internal Controls for Political Committees*,
5 available at http://www.fec.gov/law/policy/guidance/internal_controls_polcmtes_07.pdf. The
6 controls "are not mandatory requirements but are intended to assist committees in protecting their
7 assets and complying with the requirements of the FECA. *See id.*

8 Based on preliminary information, it appears that the Committee lacked sufficient
9 financial controls that would have been enabled it to detect McCrosson's embezzlement.
10 McCrosson maintained sole possession of the Committee's financial records and was the sole
11 signatory on the Committee's bank accounts. *Supra* at 3, 5. There were also "no periodic
12 reviews or audits" of the committee's financial records. Criminal Information at 3. Thus, it
13 appears likely that the Committee had few internal controls to safeguard campaign funds, and as
14 a result, may not qualify for the self-reported embezzlement safe harbor. However, in order to
15 properly assess the extent of the Committee's potential liability in this matter, we will need to
16 know more about the internal controls the Committee did have in place at the time of the
17 embezzlement, including the duties of the various staff members. Further, although the
18 documents from McCrosson's criminal case provide the basic facts regarding the embezzlement
19 and his attempts to disguise it, we need to obtain more details in order to make a fully informed

⁷ These safeguards include: (1) opening all bank accounts in the name of the committee using its Employer Identification Number; (2) monthly bank statements are reviewed for unauthorized transactions and reconciled by someone other than the individual with check signing authority or who has responsibility for the committee's accounting; (3) dual-signing authority for checks over \$1,000; (4) procedures for handling incoming receipts by someone other than the individuals with accounting or banking authority; and (5) safeguards for managing a petty cash account. Further, when a committee discovers misappropriation of funds, it must notify the Commission and the relevant law enforcement authority and promptly amend its disclosure reports to correct errors. *See Safe Harbor Policy* at 16,695.

1 recommendation. Finally, we believe it is appropriate to allow the Committee more time to
2 continue to work with RAD to correct its reports. Accordingly, we recommend that the
3 Commission take no action at this time as to the Committee so that we can continue to work with
4 the Committee under the normal *sua sponte* process to complete the factual record in this
5 matter.⁸ We will return to the Commission with appropriate recommendations shortly after the
6 Committee completes its cooperation with the Commission.

7 **2. Andrew McCrosson's Liability**

8 The Act prohibits any person from converting contributions to a Federal candidate for
9 personal use. 2 U.S.C. § 439a(b)(1). "Personal use" means any use of funds in a campaign
10 account of a federal candidate to fulfill a commitment, obligation, or expense of any person that
11 would exist irrespective of the candidate's campaign duties. *See* 2 U.S.C. § 439a(b)(2). The Act
12 and Commission regulations set forth some *per se* examples of personal use, including mortgage
13 payments, tuition payments, noncampaign-related automobile expenses, and health club dues,
14 among others. *See* 2 U.S.C. § 439a(b)(2)(A)-(I); *see also* 11 C.F.R. § 113.1(g).

15 In this matter, McCrosson wrote unauthorized checks to himself from the Committee's
16 bank accounts for personal expenses, including payments on a "federal income tax lien, home
17 mortgage payments, college tuition payments for his children, and other living expenses,"
18 expenses which existed irrespective of the candidate's election campaign. Criminal Information
19 at 5. The available information indicates that McCrosson wrote checks to himself and deposited
20 the unauthorized Committee checks into his personal bank account. *See* Check numbers 1676,

⁸ Consistent with the Commission's decision in MURs 6178 and 6179 (formerly Pre-MUR 470 and RR 08L-22) (NRCC/Ward), we are not recommending that the Commission open a MUR as to the Committee at this time. *See* Amended Certification for MURs 6178 and 6179 dated March 6, 2009 (Commission opened MURs only as to Christopher Ward and decided to "maintain as Pre-MUR 470" and "maintain as RAD Referral 08L-22" with respect to the NRCC. The Commission also decided to "[t]ake no action at this time" with respect to the NRCC.).

1 1677, 2135 and 2351, including "for deposit only" endorsements on reverse. In addition,
2 according to the Commission's *Statement of Policy Regarding Treasurers Subject to*
3 *Enforcement Proceedings*, a former treasurer may be named as a respondent in his or her
4 personal capacity when it appears that he or she, while serving as treasurer, may have violated
5 obligations imposed by the Act or regulations, and where the violation was knowing and willful.
6 70 Fed. Reg. 3 (January 3, 2005). See MUR 6179 (Christopher Ward), MUR 5610 (Earl Allen
7 Haywood), MUR 5721 (Lockheed Martin), MUR 5971 (Jennifer Adams). Under the Act, a
8 treasurer is required to accurately keep an account of and report disbursements. See 2 U.S.C.
9 §§ 432(c)(5), 434(b)(4) and (6). Committee treasurers are also personally responsible for the
10 timely and complete filing of reports and statements required by the Act and for the accuracy of
11 any information or statement contained in it. 11 C.F.R. § 104.14(d). In this matter, McCrosson
12 wrote checks from the Committee's account to himself for his own personal use over the course
13 of fifteen years in his capacity as treasurer of the Committee and then failed to report those
14 disbursements and filed false reports with the Commission on behalf of the Committee.
15 Consequently, it is appropriate to make findings as to Andrew McCrosson in his personal
16 capacity for his actions while serving as treasurer of the Committee, and he should be named in
17 his personal capacity for these violations.

18 The Act also addresses violations that are knowing and willful. See 2 U.S.C.
19 § 437g(a)(5)(B). The knowing and willful standard requires knowledge that one is violating the
20 law. The phrase "knowing and willful" indicates that "acts were committed with full knowledge
21 of all of the relevant facts and a recognition that the action is prohibited by law... ." 122 Cong.
22 Rec. H3778 (daily ed. May 3, 1976); see also *AFL-CIO v. FEC*, 628 F.2d 97, 98, 101-02

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1 (D.C. Cir.), *cert. denied*, 449 U.S. 982 (1980) (noting that a "willful" violation includes "such
2 reckless disregard of the consequences as to be equivalent to a knowing, conscious, and
3 deliberate flaunting of the Act," but concluding on the facts before it that this standard was not
4 met) (*cited in National Right to Work Comm. v. FEC*, 716 F.2d 1401, 1403 (D.C. Cir. 1983)).
5 An inference of knowing and willful conduct may be drawn "from the defendant's elaborate
6 scheme for disguising" his or her actions. *United States v. Hopkins*, 916 F.2d 207, 214-15 (5th
7 Cir. 1990). The evidence need not show that the defendant "had specific knowledge of the
8 regulations" or "conclusively demonstrate" a defendant's "state of mind," if there are "facts and
9 circumstances from which the jury reasonably could infer [the defendant] knew her conduct was
10 unauthorized and illegal." *Id.* at 213 (*quoting United States v. Bordelon*,
11 871 F.2d 491, 494 (5th Cir.), *cert. denied*, 439 U.S. 838 (1989)). In this matter, available
12 information indicates that McCrosson attempted to disguise his theft of Committee funds by
13 filing false disclosure reports with the Commission that omitted the disbursements to himself,
14 from which we can infer that he had knowledge his conduct was prohibited by law.

15 Accordingly, we recommend that the Commission find reason to believe that Andrew J.
16 McCrosson, Jr. knowingly and willfully violated 2 U.S.C. §§ 432(c), 434(b) and 439a(b).

17 **III. INVESTIGATION**

18 We cannot, at this time, propose entering into pre-probable cause conciliation with
19 McCrosson because we lack sufficient details about the unauthorized disbursements, the
20 Committee's internal controls, and the extent of the reporting violations. Therefore, we propose
21 a limited investigation to ascertain the dates of the unauthorized disbursements in order to

determine the amount in violation that is still within the statute of limitations. In the event that McCrosson does not respond to informal requests for information or may not have access to relevant documents that are available through other sources such as financial institutions, we also recommend that the Commission authorize the use of compulsory process. The details from the proposed investigation will aid in the proper calculation of McCrosson's civil penalty for his knowing and willful violations.

IV. RECOMMENDATIONS

1. Take no action at this time with respect to LoBiondo for Congress and Nancy H. Watkins, in her official capacity as treasurer.
2. Find reason to believe that Andrew J. McCrosson, Jr. knowingly and willfully violated 2 U.S.C. §§ 432(c), 434(b) and 439a(b).
3. Approve the attached Factual and Legal Analysis.
4. Authorize the use of compulsory process in this matter, including the issuance of appropriate interrogatories, document subpoenas, and deposition subpoenas, as necessary.
5. Approve the appropriate letters.

Anthony Herman
General Counsel

10-14-11
Date

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